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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

IN RE FONTEM US, INC. CONSUMER CLASS ACTION LITIGATION

Case No.: 8:15-cv-01026-JVS-RAO

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECOND CONSOLIDATED AMENDED COMPLAINT

Judge: Hon. James V. Selna
Mag. Judge: Hon. Rozella A. Oliver

Date: September 12, 2016
Time: 1:30 p.m.
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INTRODUCTION

In their second motion to dismiss (ECF No. 74), Defendants argue that because FDA has finalized its rule deeming certain products – including certain electronic cigarette products – to be subject to the Family Smoking Prevention and Tobacco Control Act ("TCA"), 21 U.S.C. §§ 387, *et seq.*, the TCA now preempts Plaintiffs' claims. Defendants, however, simply ignore controlling authorities' analysis of similar preemption provisions, the preservation and savings clauses in the TCA, and FDA's analysis of its own regulation. Indeed: (1) under *Medtronic v. Lohr* and its progeny, the TCA and regulations promulgated thereunder contain no requirement that is sufficiently specific to preempt Plaintiffs' claims; (2) the TCA's preservation and savings clauses expressly exempt Plaintiffs' claims from preemption as such claims all relate to "exposure to," "use of," and "advertising and promotion of" tobacco products; and (3) FDA has determined that its new regulation does not preempt state warning requirements, including those embodied in Proposition 65. Defendants also proffer arguments for dismissing the Illinois claims that misconstrue both the claims and applicable precedent. Their motion should be denied.

BACKGROUND OF THE TCA AND THE DEEMING REGULATION

I. THE TOBACCO CONTROL ACT

In enacting the TCA, Congress devoted careful attention to the subject of preemption. The TCA sets forth Congress's intent to allow the States to supplement any federal regulations with additional and more stringent state requirements in a section entitled "Preservation of State and Local Authority." 21 U.S.C. § 387p. In this section, Congress explicitly preserved state authority to regulate issues at the heart of this lawsuit – exposure to, use of, and advertising and promotion of tobacco products:

> Except as provided in [the preemption clause below] nothing in [the TCA or FDA rules implementing the TCA] shall be construed to limit the authority of a . . . State . . . to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is ***in addition to***, or ***more stringent than***, requirements established under [the TCA], including a law, rule, regulation, or other

> measure relating to or prohibiting the sale, distribution, possession, ***exposure to***, access to, ***advertising and promotion of***, or ***use of*** tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products . . . .

21 U.S.C. § 387p(a)(1). Only after preserving state authority did Congress address the preemptive scope of the TCA:

> No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of [the TCA] relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

Id. §387p(a)(2)(A). Congress then significantly narrowed the preemptive reach of the TCA in the savings clause:

> [the preemption clause] does not apply to requirements relating to the sale, distribution, possession, information reporting to the State, ***exposure to***, access to, ***the advertising and promotion of***, or ***use of***, ***tobacco products*** by individuals of any age, or relating to fire safety standards for tobacco products.

Id. § 387p(a)(2)(B) (emphases added). Courts analyzing preemption under the TCA uniformly hold that the preemption provision in Section 387p(a)(2)(A) must be narrowly construed, while the savings clause of Section 387p(a)(2)(B) is entitled to broad construction. *National Ass'n of Tobacco Outlets v. City of Providence*, 731 F.3d 71, 82 (1st Cir. 2013); *United States Smokeless Tobacco Mfg. Co., LLC v. City of N.Y.*, 703 F. Supp. 2d 329, 340, 344-345 (S.D.N.Y. 2010).

II. THE DEEMING REGULATION

The TCA applies to "all cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco" and "any other tobacco products that the [FDA] by regulation deems to be subject" to the TCA. 21 U.S.C. § 387a(b). To define the reach of its authority, on May 10, 2016, FDA published its final rule *Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act*, 81 Fed. Reg 28974 (May 10, 2016) (the "Deeming Regulation"). The Deeming Regulation extends FDA's authority to regulate tobacco products under the TCA to any product that is "made or derived from tobacco that is intended for human consumption," including cigars, pipe tobacco, hookah tobacco and electronic cigarettes ("e-cigarettes"). 21 C.F.R. § 1100.1; 81 Fed. Reg. at 28976.[1]

The Deeming Regulation imposes "***minimum*** required warnings" on tobacco products. 21 C.F.R. § 1143.3 & 1143.5 (emphasis added). The first such "minimum" warning requires the packaging of ***all*** tobacco products to bear a "warning statement regarding addictiveness of nicotine" as follows: "WARNING: This product contains nicotine. Nicotine is an addictive chemical." *Id.* § 1143.3. The only other warning requirement imposed by the Deeming Regulation specifically applies to cigars. *Id.* § 1143.5. Neither of these warning requirements becomes effective until May 10, 2018. *Id.* § 1143.13. The Deeming Regulation has no warning requirement specific to e-cigarettes.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOT PREEMPTED BY THE TCA OR DEEMING REGULATION

Defendants' argument that Plaintiffs' claims are expressly preempted under the TCA fails.[2] The "inquiry into the scope of a statute's pre-emptive effect is guided by the rule that '[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Express preemption analysis begins "with the assumption that the historic police powers of the States are not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Altria Grp.*, 555 U.S. at 77 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The presumption against preemption applies with particular force in areas such as consumer health and safety that have been traditionally regulated by the States. *See Stengel v. Medtronic Inc.*, 704 F.3d 1224, 1228 (9th Cir. 2013).

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[1] Under this definition, e-cigarette products that use synthetic nicotine are outside the scope of the TCA and Deeming Regulation, as such products are not "derived from tobacco." Defendants have failed to submit any evidence that the BLU e-cigarettes they produce (the "Products") are "derived from tobacco" and thus subject to the Deeming Regulation. However, for purposes of this motion, Plaintiffs assume that the Products are so derived.

[2] Defendants' motion is based solely on express preemption. However, if Defendants improperly raise any argument regarding implied or conflict preemption on reply, Plaintiffs reserve their right to respond.

Applying these principles here, Defendants' express preemption argument fails for a number of reasons. First, the narrow scope and general applicability of the "minimum" nicotine warning requirement under the Deeming Regulation is insufficient to preempt Plaintiffs' state law claims concerning Defendants' Products. Second, Plaintiffs' claims relate to "exposure to," "use of" and "advertising and promotion of" tobacco products, and thus are exempt from TCA preemption under the preservation and savings clauses. Third, FDA's reasonable interpretation that the TCA and Deeming Regulation do not preempt state health warning requirements is entitled to great deference and should be upheld by this Court.

A. The TCA and Deeming Regulation's General Warning "Requirement" Does Not Preempt Plaintiffs' Claims

The TCA's preemption clause provides that no "State may establish or continue in effect with respect to a tobacco product any ***requirement*** which is different from, or in addition to, any ***requirement*** under the provisions of" the TCA "relating to," among other things, "labeling." 21 U.S.C. § 387p(2)(A) (emphases added). Yet, there is no federal "requirement" applicable to Defendants' Products under the TCA or Deeming Regulation that is specific enough to preempt Plaintiffs' claims.

The TCA is part of the broader Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301, *et seq*. When analyzing express preemption under the FDCA, the first step is to identify the "requirements imposed by the FDA with respect to [the] Defendants' [products]." *Carter v. Novartis Consumer Health, Inc.*, 582 F. Supp. 2d 1271, 1279 (C.D. Cal. 2008); *see also Seedman v. Cochlear Ams.*, No. SACV 15-00366 JVS (JCGx), 2015 U.S. Dist. LEXIS 106305, at *19-20 (C.D. Cal. Aug. 10, 2015). The second step is to "determine[] which of Plaintiffs' claims constitute state-imposed 'requirement[s]' that are 'different from or in addition to' federal requirements." *Carter*, 582 F. Supp. 2d at 1279-80. This analysis "demands a comparison between the scope of FDA requirements, on one hand, and state requirements, on the other." *Id.* at 1280.

Defendants' motion overlooks the first step in the FDCA preemption analysis – *i.e.*, identifying the federal "requirement" applicable to Defendants' Products – and wrongly assumes that the mere fact that FDA has mandated a "minimum" nicotine addictiveness warning on all tobacco products is sufficient to preempt all state health hazard warning requirements for e-cigarette products. *See, e.g.*, Motion at 2:6-10. However, the preemptive impact of federal requirements under the FDCA depends on the specificity of such federal requirements. *See Lohr*, 518 U.S. at 486-501, 507. Generally applicable "generic" regulations concerning a broad class of products are not preemptive, *id.*, whereas product-specific requirements imposed on a particular product (*e.g.*, via premarket approval) will preempt state requirements. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 321-323 (2008). Here, the Deeming Regulation's general nicotine addictiveness warning is not a sufficiently specific federal requirement capable of preempting Plaintiffs' claims.[3]

In *Medtronic, Inc. v. Lohr*, the Supreme Court held that the plaintiff's state law failure to warn and design defect claims regarding an allegedly defective catheter were not preempted by the FDCA's express preemption clause as to medical devices. 518 U.S. at 474-501. The preemption clause at issue in *Lohr* – which is substantially similar to the TCA's preemption provision – provides that no state "may establish or continue in effect with respect to a device intended for human use any requirement .

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[3] This is in stark contrast to specific labeling requirements that Congress and/or FDA has established for other tobacco products. *See, e.g.*, Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333 (detailed and specific warnings for cigarettes); Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4402 (detailed and specific warnings for smokeless tobacco).

. . which is different from, or in addition to, any requirement applicable under [the FDCA] to the device, and . . . which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device." 21 U.S.C. § 360k. Based on this language, Medtronic argued that the plaintiff's state law "cause of action is a 'requirement' which alters incentives and imposes duties 'different from, or in addition to,' the generic federal standards that the FDA has promulgated in response to mandates under" the FDCA. *Lohr*, 518 U.S. at 486. The Supreme Court rejected Medtronic's argument, stating: "we cannot accept Medtronic's argument that by using the term 'requirement,' Congress clearly signaled its intent to deprive States of any role in protecting consumers from the dangers inherent in many medical devices." *Id.* at 489, 500-501. On the contrary, the Court observed that the FDCA's express preemption clause evinced Congress's "overarching concern that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest." *Id.* at 500. Accordingly, the Court held that the plaintiff's state law claims were not preempted, reasoning that the general "federal requirements [regarding medical devices] reflect important but entirely generic concerns about device regulation generally, not the sort of concerns regarding a specific device or field of device regulation that the statute or regulations were designed to protect from potentially contradictory state requirements." *Id.* at 501.

The Supreme Court subsequently provided further clarification regarding the distinction between sufficiently specific federal requirements capable of preempting state law claims under the FDCA, and generic federal requirements that cannot preempt state law claims in *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008). In that case, similar to *Lohr*, the plaintiff argued that the design and labeling of a catheter were defective and misleading in violation of New York law. *Id.* at 320-21. The Court held that because Medtronic's catheter had received premarket approval, the FDA had established specific federal "requirements" applicable to the device which preempted conflicting state law requirements. *See id.* at 321-23. The Court distinguished *Lohr* on the ground that whereas "premarket approval . . . imposes [federal] 'requirements'" under the FDCA, federal "labeling requirements applicable across the board to almost all medical devices" do not impose preemptive "requirements." *See id.* at 322-23.

Here, the scope of the federal warning requirement applicable to Defendants' Products is generic and limited. The TCA itself does not impose any health hazard warning requirement as to electronic cigarettes. *See generally* 21 U.S.C. §§ 387-387u. Nevertheless, FDA's Deeming Regulation mandates that all covered tobacco products provide a "minimum" nicotine addictiveness warning. *See* 81 Fed. Reg. at 29060-61; 21 C.F.R. § 1143.3 & 1143.5. Similar to the general federal requirements at issue in *Lohr*, this nicotine addictiveness warning is generally applicable to all tobacco products covered by the TCA, and reflects FDA's "entirely generic concerns about [tobacco product] regulation generally, not the sort of concerns regarding a specific [product] or field of [tobacco product] regulation that the statute or regulations were designed to protect from potentially contradictory state requirements." *See Lohr*, 518 U.S. at 501. And, unlike the federal preemptive requirements in *Riegel*, the FDA has not conducted a premarket review of Defendants' Products and imposed any product-specific requirements thereto. Furthermore, as was the case in *Lohr*, the state requirements sought to be enforced in this case do not undermine the federal interest in informing consumers that nicotine is addictive. Indeed, requiring Defendants to disclose that their Products cause exposures to toxic chemicals other than nicotine will in no way contradict the federal requirement that Defendants disclose that the nicotine in their Products is addictive.[4]

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[4] Defendants may argue that *Lohr* and its progeny are distinguishable because in addition to the express preemption clause applicable to medical devices, 21 U.S.C. § 360k, FDA had promulgated a regulation interpreting the preemptive scope of 21 U.S.C. § 360k narrowly. *See* 21 C.F.R. § 808.1(d). This argument would be incorrect for at least two reasons. First, similar to the regulation in *Lohr*, FDA has issued a final rule stating its position that the TCA and Deeming Regulation do not preempt

Completely ignoring this controlling case law regarding express preemption under the FDCA, Defendants rely on readily distinguishable cases (Motion at 11-14), where federal law imposed specific "requirements" relating to the defendants' products, and such federal "requirements" would have been undermined by the imposition of conflicting state law requirements. For instance, Defendants rely heavily on *National Meat Association v. Harris*, in which the Supreme Court held that a California law prohibiting slaughterhouses from handling and selling "nonambulatory" animals was preempted under the Federal Meat Inspection Act's ("FMIA") express preemption clause, 21 U. S. C. § 678. *See Harris*, 132 S. Ct. 965 (2012). The federal regulations in that case "prescribe[d] methods for handling animals humanely at all stages of the slaughtering process" and included "specific provisions for the humane treatment of" nonambulatory animals. *Id.* at 969. In fact, the state requirement in *Harris* directly undermined the federal requirements by "substitut[ing] a new regulatory scheme [for handling nonambulatory animals] for the one the [federal agency] uses." *Id.* at 970. Here, in contrast to *Harris*, neither the TCA nor the Deeming Regulation imposes a federal warning requirement specific to e-cigarettes, and Plaintiffs' claims in no way undermine the Deeming Regulation's general nicotine addictiveness warning. Indeed, the nicotine addiction warning is expressly referred to as a "Minimum Required Warning Statement." 81 Fed. Reg. at 28989.

Defendants' reliance on *Akee v. Dow Chemical Company*, 272 F. Supp. 2d. 1112 (D. Haw. 2003), is similarly unavailing. In that case, the district court held that the plaintiffs' state law failure to warn claims were expressly preempted under the

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state health warning laws. 81 Fed. Reg. at 28989. Second, courts have applied the reasoning in *Lohr* to other express preemption clauses under the FDCA where FDA has not issued a regulation interpreting the preemptive scope of the statute. *See, e.g.*, *Sciortino v. PepsiCo, Inc.*, 108 F. Supp. 3d 780, 798 (N.D. Cal. 2015); *Goldemberg v. Johnson & Johnson Consumer Cos.*, 8 F. Supp. 3d 467, 474 (S.D.N.Y. 2014).

Federal Insecticide, Fungicide and Rodenticide Act's ("FIFRA") preemption clause, 7 U.S.C. § 136v(b). *See id.* at 1133-34. However, in *Akee*, the EPA had subjected the defendants' pesticide labels to premarket review, and had specifically approved the content of the labels. *See id.* at 1124; *see also* 7 U.S.C. § 136a(c)(5). Thus, the court held that FIFRA precluded plaintiffs from using state laws to directly "challenge . . . the adequacy of" defendants' EPA-approved pesticide labels. *Id.* at 1127, 1133-34. Indeed, under FIFRA, the additional warning language sought by plaintiffs would have required EPA approval. *Id.* Here, in contrast, Defendants' Product labeling has not been subjected to premarket review and specific FDA approval. Accordingly, Plaintiffs' claims do not "pose a direct challenge" to any product-specific federal "requirements" under the TCA or Deeming Regulation, and therefore, Plaintiffs' claims are not preempted. *Id.*[5]

B. Plaintiffs' Claims Are Based on Exposures to and Use of the Products and Thus Are Exempt from Preemption

As discussed above, there is presently no "requirement" applicable to the Products that is specific enough to trigger preemption of warning claims under the TCA. However, even assuming that there were an e-cigarette requirement sufficient to trigger TCA preemption, Plaintiffs' claims are exempted from TCA preemption under the TCA's preservation and savings clauses.

Plaintiffs bring claims for violations of: (i) the Consumers Legal Remedies Act ("CLRA"), Cal. Civil Code §§ 1750, *et seq.*; (ii) Unfair Competition Law ("UCL"),

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[5] Defendants may argue that FDA's failure to impose a specific labeling requirement on e-cigarettes or to regulate exposures to formaldehyde and other hazards other than nicotine resulting from their use constitute preemption by negative implication. Any such argument would be absurd here. There is ***no*** indication of any preemptive intent where FDA specifically recognized that its general nicotine warning is the ***minimum*** warning required. *See, e.g.*, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (lack of regulation not indicative of agency decision to preempt absent strong indication of preemptive intent).

Cal. Business & Professions Code §§ 17200, *et seq.*;[6] (iii) False Advertising Law for Deceptive, False and Misleading Advertising ("FAL"), Cal. Bus. & Prof. Code §§ 17500, *et seq.*; (iv) New York General Business Law ("GBL") § 349; (v) fraudulent concealment under Illinois law; and (vi) the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"). These claims are all based on allegations that Defendants actively concealed and failed to disclose that the aerosol produced by ***using*** the Products ***exposes*** consumers to dangerous carcinogens, such as formaldehyde, and also ***exposes*** consumers to other serious health risks. SCAC ¶ 2. Defendants concur with this assessment of Plaintiffs' claims, stating that all such claims are "based on the allegation that Defendants have failed to adequately warn or disclose to consumers the allegedly harmful ingredients ***to which they may have been exposed in using*** blu electronic cigarettes." (Motion at 2) (emphasis added). The TCA specifically preserves state requirements "relating to . . . exposure to," "use of," and "advertising and promotion of" tobacco products. 21 U.S.C. § 387p(a)(1). In addition, the TCA exempts these same state requirements from the preemption clause. *Id.* § 387p(a)(2)(A). Thus, Congress could not have been clearer in stating its intention that state requirements relating to exposure to tobacco products and advertising and promotion of tobacco products are both preserved and exempted from preemption.

1. Plaintiffs' Proposition 65 Claim Relates to Exposure to the Products

Plaintiffs allege that Defendants violate Proposition 65 because they expose users of the Products to formaldehyde, a chemical known to cause cancer, without providing a clear and reasonable warning concerning such exposure. SCAC ¶¶ 156-177. Plaintiffs' focus on the exposures resulting from use of the Products is consistent with Proposition 65 itself, which was enacted in order to allow consumers "[t]o be

[6] Plaintiffs also bring a UCL claim based on violations of Proposition 65. SCAC Count IV.

informed about ***exposures*** to chemicals that cause cancer, birth defects, or other reproductive harm." *Consumer Cause, Inc. v. Smilecare*, 110 Cal. Rptr. 2d 627, 633 (2001) (emphasis added). Given that the Proposition 65 claim is "a requirement relating to . . . exposure to . . . tobacco products," it is both preserved and exempted from preemption under the TCA. 21 U.S.C. § 387p(a)(1) & (a)(2)(B).

That Plaintiffs' Proposition 65 claim "relates" to "exposure to" Defendants' tobacco products is both clear and uncontroverted. Proposition 65 regulates exposures to a specified list of chemicals. Cal. Health & Safety Code § 25249.6. The exposure provision of Proposition 65 at issue in this case states:

> No person in the course of doing business shall knowingly and intentionally ***expose*** any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.

Id. (emphasis added). Accordingly, compliance with Proposition 65 requires a business to: (a) refrain from exposing individuals to listed chemicals altogether; (b) reduce such exposures below the level of concern; or (c) provide a clear and reasonable warning regarding the exposure. *See id.* §§ 25249.6 & 25249.10. Indeed, the only statutory exemptions from Proposition 65 involve "an ***exposure***" that: (a) is preempted by federal law; (b) takes place within twelve months of the listing of the chemical at issue; or (c) is below the no significant risk level ("NSRL") for the particular chemical. Cal. Health & Safety Code §§ 25249.10(a)-(c).[7]

Defendants completely ignore the exemption for claims relating to exposure and argue that Proposition 65 creates a labeling requirement, which would fall within the scope of TCA preemption. Defendants rest their argument that Proposition 65 is a labeling statute on a single California appellate court decision; however, there is Ninth Circuit precedent to the contrary. Defendants contend that the Court should look to case law interpreting FIFRA for guidance here (Motion at 12:17-13:14), yet fail to address *Chemical Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941, 947 (9th Cir. 1992), in which the Ninth Circuit held that Proposition 65 is not a labeling law and is therefore not preempted by FIFRA. According to the Ninth Circuit, "FIFRA does not expressly preempt Proposition 65 since point-of-sale signs do not constitute labeling under the Act." *Id.* Inexcusably, Defendants fail to even cite *Allenby*, let alone distinguish it.

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[7] The exemption set forth in Cal. Health & Safety Code Section 25249.10(c), which is referred to as the "exposure defense," is instructive in analyzing whether Proposition 65 is a requirement that relates to exposure. Under the exposure defense, a defendant may avoid Proposition 65 liability by using an exposure assessment to prove that the exposures caused by its products are below the NSRL. *See* 27 Cal. Code. Regs. ("C.C.R.") §§ 25701, *et seq*. Thus, the statute clearly "relates" to "exposure," and thus, a Proposition 65 claim is not preempted.

The *Leeman* case relied on by Defendants does, however, attempt to distinguish *Allenby*, albeit unsatisfactorily. *American Meat Institute v. Leeman*, 180 Cal. App. 4th 728, 758 (Cal. App. 2009). The *Leeman* court argues that the *Allenby* decision is inconsistent with the Supreme Court's holding in *Kordel v. United States*, 335 U.S. 435 (1948). *Leeman*, 180 Cal. App. 4th at 758. However, the *Allenby* court explicitly addressed *Kordel*, and determined that for a host of reasons, "*Kordel* does not apply." *Allenby*, 958 F.2d at 947. *Allenby* is further supported by the Court of Appeal's decision in *People v. Cotter & Co.*, 53 Cal.App.4th 1373, 1386 (Cal. App. 1997), which also held that Proposition 65 is not a labeling statute. In the face of conflicting Court of Appeal decisions, Plaintiffs respectfully submit that the Court should follow the Ninth Circuit's determination that Proposition 65 is not a labeling statute.[8]

Moreover, while Defendants urge this Court to look to case law interpreting the

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[8] Neither *Allenby* nor *Leeman* addresses the public advertising warning method expressly permitted by the Proposition 65 regulations. 27 C.C.R. § 25603.1(d) (see discussion infra, at Section I.C). Under either court's analysis, the system of signs and public advertising contemplated by the regulations would not constitute product "labeling."

FMIA and FIFRA, those statutes do not expressly preserve and exempt claims relating to exposure, use, and advertising and promotion from preemption like the TCA. Accordingly, cases interpreting the preemption clauses of those statutes are of limited value here. *Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 82 (distinguishing the *National Meat Association v. Harris* case in a TCA preemption case since the FMIA does not include a savings clause similar to that of the TCA). Finally, even assuming Proposition 65's warning requirement does constitute a "labeling" requirement, the exemption for requirements relating to exposure supersedes any preemption regarding such requirement. *See U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York*, 708 F.3d 428 (2d Cir. 2013). The cases interpreting preemption under the TCA uniformly hold that where a state requirement arguably falls within both the preemption and savings clauses of the TCA, the court should narrowly read the preemption provision and broadly apply the savings clause. *Id.*, 708 F.3d at 435-36; *National Ass'n of Tobacco Outlets v. City of Providence*, 731 F.3d 71, 82 (1st Cir. 2013).

2. Plaintiffs' Other Claims Also Relate to Use of and Exposure to the Products

Plaintiffs' other claims are similarly premised on a consumer's ***exposure to*** dangerous carcinogens and other health risks resulting from the ***use of*** the Products and the Defendants' failure to provide warnings concerning such exposures and uses and as such fall within the savings clause and exceptions to preemption. *E.g.*, SCAC ¶ 7 ("Defendants utterly fail to warn consumers and users of BLU E-Cigarettes that use of such products will expose them to a chemical known to cause cancer."); *id.* ¶ 54 ("Defendants are fully aware that their BLU E-Cigarettes are emitting aerosol that contains harmful and toxic carcinogens, have admittedly performed studies to confirm those findings, but have failed to disclose those findings to the consuming public.").

For example, the SCAC discusses at length the health risks that result from exposure to and the use of e-cigarettes. *See id.* ¶ 4 ("the vapor in e-cigarettes like

BLU E-Cigarettes is an aerosol that contains carcinogens and toxins that pose harm to the user and to people exposed to these carcinogenic materials second-hand."); *Id.* ¶ 5 (e-cigarettes require users to take deeper puffs than traditional cigarettes); *id.* ¶ 41. Notably, the SCAC spends over twenty pages discussing various studies and research that have examined how exposure to e-cigarettes can impact a consumer's health. *Id.* ¶¶ 50-91. In fact, of particular significance is the allegation that by using the Products, consumers are exposed to various toxins, including formaldehyde. *Id*. ¶ 89 ("Because formaldehyde is present in the aerosol produced by BLUs, users of such products are exposed to formaldehyde by inhaling and/or ingesting the aerosol produced by the products, which is how the BLUs are ordinarily and intended to be used."). Formaldehyde results from exposure to and/or use of BLU E-Cigarettes and is particularly harmful as it is "a hidden ingredient formed through heating as the product is used, which is known to cause cancer." *Id.* ¶ 137. Accordingly, all of Plaintiffs' claims based on use of and/or exposures to the Products are exempted from the TCA's preemption clause.

C. Plaintiffs' Claims Are Based on Advertising and Promotion of the Products and Thus Are Exempt from Preemption

In addition to preserving and exempting exposure claims from the preemptive reach of the TCA, Congress expressly preserved and exempted any state requirements relating to "the advertising and promotion" of tobacco products from preemption. 21 U.S.C. §§ 387p(a)(1) & (a)(2)(B). Here, since Plaintiffs' claims relate to advertising and promotion of the Products, such claims are exempt from the TCA's preemption clause.

Under Proposition 65, whether a particular warning is clear and reasonable is a question of fact. However, the regulations provide guidance to industry by setting forth "safe-harbor" warnings that are deemed to be clear and reasonable. 27 C.C.R. § 25603(a). For consumer products such as those at issue here, the regulations provide three methods for provision of warnings that are deemed to be clear and reasonable:

(1) a warning on the label or labeling of the product; (2) identification at the retail outlet using some type of in-store shelf-labeling or signage; and (3) a system of signs, public advertising and toll-free information services. 27 C.C.R. §§25603.1(a), (b), (d). In an apparent effort to avoid the exemption from TCA preemption, Defendants cite only the first two safe-harbor methods and ignore the third. Motion at 18:5-20. However, the law of preemption is clear – if there is any means of compliance with a state requirement that does not fall within the preempted realm of a federal statute, the state requirement is not preempted. *Comm. of Dental Amalgam Mfrs v. Stratton*, 92 F.3d 807, 810 (9th Cir. 1996); *People v. Cotter*, *supra*, 53 Cal.App.4th at 1391 (Cal. App. 1997).

According to Defendants, either placing warning labels on the Products or on retail shelves constitutes preempted labeling. Here, however, there are a number of methods of Proposition 65 compliance available to Defendants that fall outside even Defendants' construction of the preemptive reach of the TCA. As discussed above, Defendants may eliminate or reduce the formaldehyde exposures at issue such that no warning would be required. In addition, assuming Defendants choose to continue exposing their customers to formaldehyde, Defendants may comply with Proposition 65 by employing a system of signs and public advertising to provide clear and reasonable warnings. 27 C.C.R. § 25603.1(d). Since that method relates to advertising and promotion of Defendants' Products, it is subject to the explicit exemption from TCA preemption. 21 U.S.C. § 387p(a)(2)(B).

Plaintiffs' other claims also relate to the deceptive ***advertising and promotion*** of the Products. Specifically, the aforementioned causes of action are premised on the fact that Defendants omitted and concealed material information in their *advertising and promotion* of the Products. *See, e.g.*, SCAC ¶¶ 91-92, 97-98.

D. FDA Has Expressly Determined That the TCA and Deeming Regulation Do Not Preempt State Law Warning Requirements Such as those in the SCAC.

Lest there be any doubt that the TCA and Deeming Regulation do not preempt state requirements imposing disclosure obligations on e-cigarette products, FDA has explicitly rejected the very interpretation of the preemptive scope of the TCA and Deeming Regulation that Defendants espouse. Indeed, FDA determined that the Deeming Regulation does not preempt state health warning requirements including Proposition 65. 81 Fed. Reg. at 28989. FDA's interpretation of the preemptive scope of the TCA and Deeming Regulation is entitled to great deference and should be upheld by this Court.

A federal agency's "permissible construction" of the statute it administers must be upheld unless the "specific issue" is "unambiguously" resolved by the statute itself. *Chevron, U.S.A., Inc. v. NRDC*, Inc., 467 U.S. 837, 842-43 (1984). Likewise, a federal agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation and citation omitted).

Here, FDA's determination that the TCA does not preempt state warning requirements is "permissible," *Chevron*, 467 U.S. at 843, and not "plainly erroneous." *Auer*, 519 U.S. at 461. During the lengthy comment period on the proposed Deeming Regulation, FDA received comments both favoring preemption of additional warning requirements for e-cigarette products and opposing any such preemption. 81 Fed. Reg. at 28989. After considering these comments, including those relating to the Deeming Regulation's preemptive effect on Proposition 65 claims, FDA concluded that "[n]o State or local laws in effect at the close of the public comment period were identified that FDA determined would be preempted by this final rule." *Id.* To solidify its position, FDA changed "the heading of [21 C.F.R. § 1143] from 'Required Warning Statement' to 'Minimum Required Warning Statement' ***to indicate that the deeming rule does not preclude other [state] health warnings***." *Id.* (emphasis added).

FDA's reasoning for its conclusion that Proposition 65 and other state requirements relating to warnings for e-cigarettes are not preempted by the TCA is based on FDA's recognition that Congress intended to preserve state authority to regulate tobacco products. *Id.* FDA's interpretation of the TCA and Deeming Regulation as preserving state health warning requirements is eminently reasonable and directly in line with the Congressional findings and legislative history indicating Congress's desire to preserve the States' ability to enforce state consumer protection laws with respect to tobacco products. *See* Pub. L. No. 111-31, Div. A, § 2 (Findings), 123 Stat. 1776, 1777 (2009); House of Rep. Subcommittee on Health Hearing re H.R. 1108, Serial No. 110-69 (October 3, 2007) at 44.

Because the TCA's preemptive scope depends on the presence of a specific federal requirement, FDA is ideally situated to determine whether its regulation imposes such a preemptive requirement. FDA has done so here, finding that the Deeming Regulation does not preempt additional state warning requirements. Given that the agency responsible for enacting the very rule that Defendants contend preempts Proposition 65 and other state warning requirements has considered the exact issue and determined that the rule does not preempt such state requirements, the Court should reject Defendants' request to second guess that determination.[9]

II. THE ILLINOIS CLAIMS ARE ADEQUATELY PLED

A. The Illinois Consumer Fraud Act Claim Is Adequately Pled

To state an ICFA claim, a plaintiff must allege "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Muir v. Playtex Products, LLC*, 983 F. Supp. 2d 980, 987 (N.D. Ill. 2013) (internal citations omitted). While conceding four of the five factors, Defendants contest that Plaintiffs have satisfied the second factor. (Motion at 20:6-23:5). But Defendants' argument is based on misinterpretation of the law and mischaracterization of the SCAC.

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[9] Defendants' failure to address FDA's determination regarding preemption of Proposition 65 is inexcusable. They will likely attempt to downplay its significance on reply, and argue that it is up to the Court, rather than FDA, to determine the preemptive reach of the TCA. Defendants, however, previously argued that the Court should "defer to the FDA's expertise." ECF No. 50-1 at 17:24.

"[O]mission or concealment of a material fact can violate the ICFA as well as a misrepresentation." *Vargas v. Universal Mortg. Corp.*, No. 01 C 0087, 2001 U.S. Dist. LEXIS 6696, at *8 (N.D. Ill. May 18, 2001). Indeed, ICFA itself provides that deceptive acts include the "concealment, suppression or ***omission of any material fact***, with intent that others rely upon the concealment, suppression or omission of such material fact." 815 ILCS 505/2 (emphasis added). "[C]ircumstantial evidence may be used to establish the seller's intent [to induce reliance]." *White v. DaimlerChrysler Corp.*, 856 N.E.2d 542, 549 (Ill. App. Ct. 1st Dist. 2006). "Furthermore, it is unnecessary to plead a common law duty to disclose in order to state a valid claim of consumer fraud based on an omission or concealment." *Al Maha Trading & Contr. Holding Co. v. W.S. Darley & Co.*, 936 F. Supp. 2d 933, 949 (N.D. Ill. 2013) (internal quotation omitted).[10] Thus, with respect to omissions, the ICFA has been interpreted to "generally … require that sellers engaged in trade or commerce disclose any material facts to consumers, regardless of the existence of a common law duty." *Miller v. William Chevrolet/Geo*, 762 N.E.2d 1, 14 (Ill. App. Ct. 1st Dist. 2001) (cited in Motion at 21:20-22). Moreover, "[a]n omission of fact occurs whenever a defendant has omitted facts of which he possesses almost exclusive knowledge the truth or falsity of which is not readily ascertainable by the plaintiff." *Allen v. Citicorp Mortgage Co.*, 1995 U.S. Dist. LEXIS 1555, **2-3 (N.D. Ill. Feb. 8, 1995) (internal quotation omitted).

Here, Plaintiffs have alleged an actionable omission under ICFA. The SCAC states that the Illinois Plaintiff saw and relied on the package, and that the package, despite disclosing certain ingredients, and a risk that nicotine is addictive and causes birth defects, omitted numerous other health risks, including deeper puffing and that in using the product she would be consuming the carcinogen formaldehyde, that were known to Defendants. SCAC at ¶¶ 25-26, 195-198.

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[10] *See also Muehlbauer v. GMC*, 431 F. Supp. 2d 847 (N.D. Ill. 2006) (overruled as to unrelated issues as stated in *Sadler v. Pella Corp.*, 146 F. Supp. 3d 734, 759 (D.S.C. 2015))(duty to disclose is not required for an omission claim under the ICFA to be viable).

When courts address ICFA omissions claims, the defendants' intentions are often discussed no further than allegations concerning their knowledge and non-disclosure. *See*, *e.g.*, *Pappas v. Pella Corp*., 363 Ill. App. 3d 795, 799, 805 (Ill. App. Ct. 1st Dist. 2006) (cited in Motion at 20:21-21:1, 21:4-7) ("plaintiffs allege they relied on [defendant's] concealment by silence [and] [r]equiring anything more would eviscerate the spirit and the purpose of the consumer fraud act"); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 595 (Ill. 1996) (cited in Motion at 21:3-5, 23:15-19) (affirming reinstatement of ICFA claim where it was based on defendant's "concealment of material facts regarding the Samurai's safety risk"); *Perona v. Volkswagen of America, Inc.*, 684 N.E.2d 859, at 866-869 (Ill. 1997) (same).

Moreover, Plaintiffs have clearly alleged Defendants' prior knowledge of the undisclosed risks of the BLU E-Cigarettes. The SCAC identifies a large number of negative studies that Plaintiffs allege Defendants knew of, and knew would be important to consumers, but did not disclose. SCAC at ¶¶ 40-91. Defendants' argument that this is not sufficient to allege intent to induce reliance is without support.[11] Plaintiffs also allege Defendants' membership in industry groups and submissions to the FDA as evidence of their knowledge of the undisclosed facts. *Id*. at ¶¶ 50-54.

Further, Plaintiffs have alleged materiality. The SCAC states that the omission was important to the Illinois Plaintiff's purchasing decision, in that she would not have purchased, or would have paid less for, BLUs had she known the truth. *Id*. at ¶

[11] *Miller*, 326 Ill. App. 3d and *People ex rel. Madigan v. United Constr. of Am.*, 2012 IL App (1st) 120308, ¶ 9 (Motion at 21:20-24) merely stand for the undisputed proposition that a defendant's intention of a plaintiff's reliance must be pled and do nothing to suggest that Plaintiffs here have not pled it.

25. This is sufficient to allege materiality. *See Jamison v. Summer Infant (USA), Inc.*, 778 F. Supp. 2d 900, 911 (N.D. Ill. 2011). ("A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase.") (internal quotation omitted). Thus, for example, in *Stella v. LVMH Perfumes & Cosmetics USA, Inc.*, 564 F. Supp. 2d 833, 836 (N.D. Ill. 2008), the court denied a motion to dismiss an ICFA claim where the complaint "allege[d] defendant failed to include lead in its ingredient list for the lipstick and that [the plaintiff] would not have purchased the lipstick had she known she would have been exposed to the lead contained in the product." This is directly analogous to the omission concerning formaldehyde here.

Moreover, contrary to Defendants' argument, their intention of reliance is clear. To satisfy [the ICFA's] intent requirement, plaintiff need not show that defendant intended to deceive the plaintiff, but only that the defendant intended the plaintiff to rely on the (intentionally or unintentionally) deceptive information given." *Chow v. Aegis Mortg. Corp.*, 286 F. Supp. 2d 956, 963 (N.D. Ill. 2003). Here, Defendants intended plaintiffs to rely on their package. It was entirely reasonable for consumers to view that package as disclosing all material risks and all ingredients that would be consumed during use. Thus, the requisite intent is shown. Moreover, Plaintiffs allege that Defendants failed to state that their products contain carcinogens like formaldehyde and require deeper puffing because disclosing such information on the label would have hurt their sales. They intended consumers to rely on the fact that no risks or dangers besides nicotine are stated on the package and that is exactly what occurred. A "defendant is presumed to have intended the necessary consequences of his conduct." *Indus. Encl. Corp. v. Northern Ins. Corp.*, 97 C 6850, 2000 U.S. Dist. LEXIS 11567, at *24 (N.D. Ill. July 25, 2000). A court may infer from allegations that a "defendant intentionally concealed facts from [consumers] … in order to sell replacement parts and increase profits" that the defendant intended for the plaintiff to rely on its concealment. *White v. DaimlerChrysler Corp.*, 856 N.E.2d at 549.

The SCAC also includes new allegations regarding Defendants' intent to conceal the risks of their Products. The SCAC states that Defendants' website suggested that consumers ignore negative studies as nothing more than media hype. SCAC at ¶¶ 98, 197. While Defendants argue that they cannot be alleged to have concealed the existence of studies referencing risks while disclosing the existence of negative articles on their website (Motion at 22:17-21), they do not address the reality that suggesting consumers should ***disregard*** information has a similar effect to concealing it.[12] At a minimum, this raises a factual issue for the finder of fact.

Intertwined with their argument that Plaintiffs have failed to allege intention to deceive, Defendants assert that "partial representations" do not give rise to claims under Illinois law. (Motion at 20 n.5:26-28; *see also* 22:22-23:5.) In so doing, Defendants rely on *Spector v. Mondelez Int'l, Inc.*, No. 15 C 4298, 2016 WL 1270493, at *9 (N.D. Ill. Mar. 31, 2016) and *Phillips v. DePaul Univ.*, 2014 IL App (1st) 122817 (Ill. 2015). Plaintiffs respectfully submit that these cases are inapposite.[13] In *Spector*, the products at issue were breakfast items that the defendants affirmatively represented as providing four hours of energy. The plaintiff alleged the representation was false because – undisclosed by defendant -- unless the product was consumed with a half a cup of milk, four hours of energy would not be provided. The court rejected the ICFA claim because it found the plaintiff did not allege any facts or studies indicating that, without milk, the product would not provide the promised energy. Thus, under the court's logic, the plaintiff had failed to plead a falsity that resulted from the partial omission. In contrast here, Defendants do not argue that Plaintiffs have failed to allege falsity or deception and indeed the Court has already held that Plaintiffs have done so. ECF 60 at 22. That is, Plaintiffs have alleged that the packages omitted that consumers would inhale formaldehyde and other harmful substances when using BLUs, and that BLUs had other undisclosed risks such as requiring deeper puffs than traditional cigarettes, resulting in the distribution of harmful material deeper in the lungs. *See, e.g.*, *Stella*, 564 F. Supp. 2d 833, 836. The SCAC also alleges numerous studies listing risks associated with using e-cigarettes including BLUs.

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[12] The SCAC also adds further allegations concerning Defendants' knowledge of the information that they concealed. First, Defendant Lorillard participated at least by 2013 in CORESTA, an organization formed in part to respond to scientific research relating to tobacco products, including E-Cigarettes. SCAC at ¶¶ 53, 196. In addition Lorillard admitted in comments on an FDA rule proposal, that it took steps after it acquired BLU in 2012 to study the safety of BLU and its aerosol and that BLU's contain toxins and other unhealthy substances and there are no long-term studies on their safety. *Id*. at ¶¶ 50-52. *See also id.* at ¶ 54. While Lorillard pledged to make its toxicology report and aerosol testing available to the public, neither it nor any of the other Defendants has done so. *Id.*, at ¶ 51. This further evidences Defendants' intentional omission of material facts, an omission on which they intended Plaintiffs would rely.

[13] Plaintiffs recognize that this Court relied on *Spector* and referenced *Spector*'s citation to *Phillips* in its prior dismissal, and wish to provide fuller information about these cases to aid the Court in its setting of precedent that could broadly impact ICFA actions.

In support of the principal at issue, *Spector* relied on *Phillips*, 2014 IL App (1st) 122817 (Ill. 2014). *Phillips*, however, did not actually hold that a partial disclosure could ***never*** give rise to an ICFA claim. In *Phillips*, the plaintiffs were law students who alleged that certain graduate employment statistics their school had advertised were misleading because they failed to disclose that the statistics included non-legal and part-time employment numbers. The court held that, "in analyzing whether plaintiffs sufficiently alleged a deceptive act or practice committed by [defendant] in the publication of … information, ... the analysis must consider whether the act was deceptive as reasonably understood in light of all the information available to plaintiffs." *Id.* at ¶ 44. The plaintiffs admitted they were aware of widely available annual ABA guides that gave accurate context about the employment data. *Id.* (Also, law school applicants commonly consider the ABA Guides.) In addition, while the complaint alleged that defendants had omitted that the data was based on voluntary student surveys, the plaintiffs admitted they knew that as well. *Id.* at ¶ 38. This distinguishes *Phillips* from the case at bar because Plaintiffs did not, and consumers of low cost products like e-cigarettes are not expected to, have knowledge of or review complex medical research before their purchases. *Phillips* is also inapposite in that the employment statistics disseminated by the defendants were broken down into six categories, only two of which technically required a law degree. *Id.* at ¶¶ 41-42. Thus, the very statements that the plaintiffs alleged led them to believe the statistics concerned only legal employment could be read to suggest that they might not. In short, unlike here, where this Court has already ruled that Plaintiffs have sufficiently alleged deception and Defendants do not make such a challenge with respect to the SCAC, the plaintiffs in *Phillips* could not reasonably claim to have been deceived..

Ultimately, the ICFA covers "deceptive acts." 815 ILCS 505/2. Whether allegations involve pure affirmative misrepresentations, pure omissions or partial misrepresentations, ICFA claims are viable if defendants have acted in a deceptive manner that is misleading in not disclosing a material fact. Here, that is precisely what Plaintiffs allege.

B. The Fraudulent Concealment Claim is Adequately Pled

The elements of a claim for fraudulent concealment include: "(1) the concealment of a material fact; (2) [] the concealment was intended to induce a false belief, under circumstances creating a duty to speak; (3) [] the innocent party could not have discovered the truth through a reasonable inquiry or inspection, or was prevented from making a reasonable inquiry or inspection, and relied upon the silence as a representation that the fact did not exist; (4) [] the concealed information was such that the injured party would have acted differently had he been aware of it; and (5) [] reliance by the person from whom the fact was concealed led to his injury." *de David v. Alaron Trading Corp.*, No. 10 CV 3502, 2015 U.S. Dist. LEXIS 60403, at *21 (N.D. Ill. May 7, 2015). Here, the bases for meeting the first and third through fourth factors are described above in the section concerning the ICFA claim, as are the second factor's required allegations that the concealment was intended to induce Plaintiffs' false belief. Defendants raise no argument about the fifth factor, and the Illinois Plaintiff, moreover, alleges that she relied on Defendants' packages as providing the full truth about the material health risks associated with use of BLU E-

Cigarettes, SCAC ¶¶ 194-195, and that she would not have purchased them, or would have paid less for them, had the truth been disclosed. *Id.* at ¶ 26. And, as described below, Plaintiffs satisfy the remaining element, that Defendants had a duty to disclose the omitted information.[14]

It has been acknowledged in Illinois courts that "[a] statement which is technically true may nevertheless be fraudulent where it omits qualifying material since a 'half-truth' is sometimes more misleading than an outright lie." *W.W. Vincent & Co. v. First Colony Life Ins. Co.*, 351 Ill. App. 3d 752, 762 (Ill. App. Ct. 1st Dist. 2004). This can give rise to a duty to disclose, satisfying the pleading requirements of a fraudulent concealment claim. *Id.* *See also University of Illinois v. First American Nat'l Bank*, No. 87 C 7044, 1989 U.S. Dist. LEXIS 9525, at **3-4 (N.D. Ill. Aug. 7, 1989) ("[a] statement containing a half-truth may be as misleading as a statement wholly false") (quoting Restatement (Second) of Torts § 529 (1977)). *See also Heider v. Leewards Creative Crafts*, 245 Ill. App. 3d 258, 265 (Ill. App. Ct. 2d Dist. 1993) (because "[a] statement which is technically true as far as it goes may nonetheless be fraudulent if it is misleading because it does not state matters which materially qualify that statement" holding that a statement that materials were "not a problem" could be true as to the current state of the materials but nonetheless misleading because of their future potential release of asbestos into the warehouse environment). A duty to disclose can arise "when the defendant's acts contribute to the plaintiff's misapprehension of a material fact and the defendant intentionally fails to correct plaintiff's misapprehension." *Mercantile Capital Partners v. Agenzia Sports, Inc.*, 04 C 5571, 2005 U.S. Dist. LEXIS 5609 (N.D. Ill. 2005) (internal quotation omitted). Illinois courts have held that while "silence in a business transaction does not necessarily amount to fraud, silence accompanied by deceptive conduct or suppression of material facts results in active concealment," *University of Illinois*, 1989 U.S. Dist. LEXIS 9525, at **2-4, "and it then becomes the duty of the person to speak." *Russow v. Bobola*, 277 N.E.2d 769, 771 (Ill. App. Ct. 1972). *See also Heider*, 245 Ill. App. 3d at 270 ("silence accompanied by deceptive conduct results in an act of concealment, and at that point a duty to disclose arises").

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[14] Because the ICFA claim is properly pled, Defendants' argument that the fraudulent concealment claim must fail if the ICFA claim does is irrelevant.

Here, Plaintiffs allege that by warning that there were certain nicotine and other related risks, Defendants implied that those were the only health-related risks concerning BLUs. No mention is made on BLUs label of the other carcinogens, toxins and impurities that are found in BLUs, or of compensatory inhalation. SCAC ¶¶ 150-55. Defendants' knowledge of the risks associated with their Products and the ingredients that a consumer would inhale when using them, and disclosure of only some of these, gave rise to a duty to disclose the rest.

For the foregoing reasons, all of Defendants' arguments about the Illinois claims are without merit.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully submit that Defendants' Motion to Dismiss the SCAC should be denied.

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